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Article 41 and the Right to Appeal

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Article 41 and the Right to Appeal

Extensive discussion of the Chinese Constitution focuses on the ways in which the Constitution is under-enforced or not implemented.2 Many leading Chinese academics used the occasion of the thirtieth anniversary of the enactment of the 1982 Constitution to discuss ways in which enforcement of the Constitution could be strengthened.3 Similarly, much of the discussion at this conference concerned possible ways to make the Constitution enforceable. This essay takes a different approach, examining one clause in the Chinese Constitution that is arguably at times over-enforced, providing constitutional authorization for challenging legal determinations outside the legal system.

This essay's focus is Article 41 of the 1982 Constitution. Article 41 protects the rights of citizens to criticize (*piping* 批评) and make suggestions (*jianyi* 建议) to state actors and to file complaints (*shensu* 申诉), charges (*konggao* 控告), or exposures (*jianju* 检举) against illegal conduct of state actors. Article 41 also requires state actors to deal with such complaints.[4] My central interest is in the meaning of the right to file complaints (*shensu* 申诉).[5] My goal in this essay is to examine the ways in which the concept of *shensu* is used to provide a basis for challenges to state action both within and outside the formal legal system. My central argument is that Article 41 provides insight into structural tensions inherent in China's constitutional framework.

My interest in Article 41 stems from an ongoing empirical project that examines the impact of petitioning on two Chinese courts.[6] That project aims to show how and why

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[2] Some recent scholarship has moved beyond this traditional framework of analysis, most notably Keith Hand's important work (Hand 2011: 60).

[3] For examples of recent discussions, see the work of prominent scholars Zhang Qianfan, He Weifang, and Tong Zhiwei (Zhang 2012a; He 2012; Tong 2012). For an excellent summary of recent writing on the Chinese constitution see Yan (2013: 2-3).

[4] The full text of Article 41 states: "Citizens of the People's Republic of China have the right to criticize and make suggestions regarding any state organ or functionary. Citizens have the right to make to relevant state organs complaints or charges against, or exposures of, any state organ or functionary for violation of the law or dereliction of duty; but fabrication or distortion of facts for purposes of libel or false incrimination is prohibited.
"The state organ concerned must deal with complaints, charges or exposures made by citizens in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposures or retaliate against the citizens making them.
"Citizens who have suffered losses as a result of infringement of their civic rights by any state organ or functionary have the right to compensation in accordance with the law" (1982 Constitution, Art. 41).

[5] At times *shensu* is translated either as "filing a complaint" or as "filing an appeal." Yet "appeal" in the context of *shensu* is distinct from an appeal in litigation, because few procedures govern the filing of *shensu* and *shensu* are usually brought after court appeals have been exhausted or are not connected to court proceedings. To avoid confusion I use the Chinese term *shensu* throughout this essay.

[6] I have also discussed the impact of petitioning on China's courts more generally in prior work (Liebman 2011).

petitioning, even by individuals, is an effective mechanism for influencing the courts. Court records reveal that petitioning is often an effective tool for individuals and groups seeking to change already final court decisions or seeking direct compensation from the state. Assessing the merits of such petitions is of course difficult. Some such cases almost certainly involve wrongly or unfairly decided cases. Yet others involve grievances brought by individuals facing hardship where courts likely have done nothing wrong, in particular in cases where decisions are unenforced because defendants cannot be located or lack resources to pay judgments. My interest in petitioning has led me to take a greater interest in the concept of *shensu* – filing a complaint or appeal, a term that appears not only in the Constitution but also in a number of specific laws. The concept of *shensu* is not limited to complaints filed to the courts, but it is of particular importance in the courts, when *shensu* are often handled alongside petitions and where the ability to *shensu* provides recourse for litigants even after appeals have been exhausted and the time for filing a formal rehearing petition has expired.

What does Article 41's reference to the right to file a *shensu* mean? The provision has received little scholarly attention. Scholarly discussion of Article 41, in China and the west, largely consists of general references to the concept of a right to complain or notes the relationship between Article 41 and the petitioning system. Sometimes the media cite Article 41 as supporting the media's right to "supervise" the state. (Liu 2013) (Feng 2013). Few scholars discuss the specific meaning of Article 41, in particular the right to *shensu*, or how it is enforced.[7]

The right to file a *shensu* includes a broad range of mechanisms for challenging state action: petitioning through the letters and visits system, filing an administrative appeal, administrative litigation, and filing a formal application for rehearing in a court case (Zhang & Gu: 2011: 33-35). There is debate within China on whether to understand Article 41 as providing a procedural right to challenge state action or a broader political right to speak out and contest state action.[8] Yet it is clear that the right to *shensu* includes both the right to use formal procedures to contest state action and also to seek redress outside of such formal procedures when such procedures either are not available or are not effective. *Shensu* includes the right to challenge final court decisions through the legal system and to challenge state action outside the legal system when legal procedures have been exhausted and when legal remedies do not exist. Article 41 thus includes the right to

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[7] For example, see Chen (2009), arguing that the right to *shensu* means the right to file a complaint or charge against state organs. One exception to this trend is the detailed study of Zhang and Gu (2011), discussed further below, which analyzes the right to *shensu* and related statutory provisions in detail from the perspective of administrative law. Zhang and Gu also provide an overview of existing literature on Article 41.

[8] Those who argue that the right to *shensu* is a procedural right focus on the ways that the concept is implemented through formal law. Those who view Article 41 as providing a political right tend to define *shensu* more broadly to include a range of action inside and outside the legal system. Zhang and Gu (2011: 33-34) provide a good summary of existing debates on the meaning of Article 41. They argue that legal provisions governing *shensu* can be broken down into four separate meanings: a basic right under the constitution, a mechanism for seeking redress under administrative law, a means of initiating rehearing procedures in the courts, and a mechanism for initiating the renewal of formal administrative proceedings (Zhang & Gu 2011).

challenge final decisions in the courts, but it is not specifically targeted at the courts. *Shensu* petitions can be filed with a range of state actors.

In addition to the Chinese Constitution, 31 Chinese laws mention the right to petition (Zhang & Gu 2011: 32).[9] These provisions largely fall into two categories: those that provide a formal procedure for challenging decisions and those that provide a general right to relief outside of formal legal procedures (Zhang & Gu 2011: 33). Yet the boundaries between formal and informal and between *shensu* and other mechanisms for challenging state action are often unclear.

The role of *shensu* in procedural laws

Examination of the concept of *shensu* in China's three primary procedural laws[10] provides insight into how Article 41 has been translated into practice in the courts and also into some of the ambiguity that continues to exist. All three laws provide a legal basis for challenging already final court judgments, although the particular terms and procedures used to describe such challenges vary. Scholars cite these provisions as a mechanism by which the constitutional right to file a *shensu* is made effective.

The concept of *shensu* is most clearly articulated in the Criminal Procedure Law. The Criminal Procedure Law states that parties to a criminal case, their legal representatives, or close relatives may challenge already decided cases by filing *shensu* petitions (2012 Criminal Procedure Law, Art. 241). The recently revised criminal procedure law states that courts should retry cases in response to a *shensu* petition where there is new evidence proving there was an error, where there was insufficient evidence or evidence should have been excluded, where the original judgment included a misapplication of law, where there was violation of procedure that might have affected the fairness of the outcome, or when a judge handling the cases was involved in corruption or other illegal conduct (2012 Criminal Procedure Law art. 242).[11] There is no time limit on when *shensu* may be filed. The Supreme People's Court has also specified requirements for *shensu* filings in criminal cases (Criminal Procedure Law Interpretation, art. 372) and has instructed courts to respond within three months, which may be extended to six months (*ibid.,* art 375). If the court determines that a *shensu* has merit the court then initiates (or orders a lower court to initiate) a retrial. The 2012 Criminal Procedure Law added significant detail regarding the specific requirements for filing a *shensu* compared to the 1996 Criminal Procedure Law.[12] The new law thus provides a quasi-formal mechanism for challenging final criminal judgments at any time through the filing of a *shensu* petition.

In contrast to the Criminal Procedure Law's extensive reference to *shensu*, the Civil Procedure Law largely speaks of litigants having the right to file a formal application for a

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[9] The Basic Laws of Hong Kong and Macao also use the term, but are not relevant to the discussion here and thus are not included in the 31 laws listed.

[10] China has not yet adopted an Administrative Procedure Act, only the narrower Administrative Litigation Law. Scholars in China generally refer to the Criminal Procedure Law, Civil Procedure Law, and Administrative Litigation Law as China's three primary procedural laws.

[11] The SPC's interpretation in the Criminal Procedure Law also makes clear that a non-party to a case may file a *shensu* petition if he or she believes that an incorrect final judgment has adversely affected his or her legal rights (Criminal Procedure Law Interpretation, art. 371).

[12] For a discussion of the changes, see Zhang & Jiang (2012: 353-358).

retrial, or *zaishen*, to challenge an already final court judgment.[13] The filing of a *zaishen* application is time-limited: prior to 2013 litigants had two years from the issuance of a final judgment to request a retrial. As of January 1, 2013, the time for filing a *zaishen* application is six months (2012 Civil Procedure Law, art. 205). The 2007 Civil Procedure Law had appeared to provide for a broader right to challenge final decisions: the 2007 law also stated that challenges to already final cases should be handed as *shensu* (2007 Civil Procedure Law, art. 111), thus suggesting a right to *shensu* in addition to a right to file for retrial through *zaishen* proceedings. The 2012 revisions changed this provision to state that litigants seeking to challenge already final court decisions should be instructed to file for a *zaishen*, or rehearing (2012 Civil Procedure Law, art. 124); there is no longer reference to a right to file a *shensu*. The change appears designed to limit the use of *shensu* outside the formal retrial process. Yet even after the six month time period for filing an application for retrial has expired a court or procuratorate may initiate a retrial on its own initiative at any time. In practice this means that after the formal time period for filing a request for a retrial has expired, litigants may nevertheless seek to convince courts or procuratorates to initiate retrials.

In a recent book on civil rehearing procedures in the courts authors from the Supreme People's Court (SPC) attempted to address confusion about the difference between *shensu* and formal retrial (*zaishen*) applications in civil cases. According to the authors, the difference between *shensu* and *zaishen* is that *zaishen* petitions follow specific legal requirements, while there are no constraints on or rules governing when and how a litigant (or non-litigant) may file an application for a *shensu* (Su 2010: 1). The right to file a *zaishen* is a procedural right; the right to seek redress through *shensu* is a constitutional right. There are no time or jurisdictional limits on filing a *shensu*, and no limits as to who may file such a petition. The authors thus explicitly state that in some cases a litigant may use *shensu* procedures even when the challenge does not meet the legal requirements for a *zaishen* (Ibid: 2). The SPC book further noted that the legal standard for courts deciding whether to reopen a case is different depending on whether a litigant challenges a decision through a *shensu* or a formal application for *zaishen*: in a *shensu* case a court must determine there was an actual error before reopening the case. In a *zaishen* proceeding, in contrast, the court determines that the procedural requirements set forth in the Civil Procedure Law and relevant SPC interpretations have been met. The court then proceeds to examine whether an error has in fact occurred. Thus in theory a court should not reopen a case in response to a *shensu* unless the court determines there has been an error; in the more formal context of rehearing courts only need to find that a party filing for a rehearing has shown that an error has likely occurred.

One notable aspect of the SPC's explanation of the scope of *shensu* is that the provision of the Civil Procedure Law that the SPC authors suggest is relevant to filing a *shensu* does

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[13] Prior to recent revisions to both the Civil Procedure Law and Criminal Procedure Law the concept of *zaishen*, or retrial, was also used in the criminal context. The revised Criminal Procedure Law appears to try to separate out the concept of *shensu* in criminal cases from the more formal *zaishen,* or retrial*,* proceedings in civil cases (Zhang & Jiang 2012: 353). Nevertheless, the terms continue to be used interchangeably, even in official publications, because a successful criminal *shensu* leads to a formal retrial. The Criminal Procedure Law continues to use the term *zaishen* to refer to retrials undertaken by the courts, but does not use the term *zaishen* in the context of requests by individuals to reconsider final judgments.

not actually mention the term. Article 177 of the 2007 Civil Procedure Law, incorporated as Article 198 in the 2012 Civil Procedure Law, states that when a court president believes that an error has occurred and that a case should be retried the court president shall refer the matter for discussion and decision to the court adjudication committee. Clearly one of the mechanisms for court leaders to become aware of such errors are *shensu* or petitions or protests in cases that fail to meet legal requirements for retrials.

China's Civil Procedure Law thus implements Article 41 of the Constitution both through formal *zaishen* retrial procedures and through creating a catch-all mechanism for courts to reopen cases at any time when errors are discovered. This is particularly likely in response to *shensu* complaints from litigants who fail to meet the procedural requirements for applying for a retrial. Article 41 thus provides a base both for formal legal procedures and for litigants to seek redress even when they do not meet the requirements of such procedures.

China's Administrative Litigation Law and Court Organization Law also mention the right to *shensu.* The Administrative Litigation Law states that a party to a case may challenge a final court decision via a *shensu* (Administrative Litigation Law, Art. 62).[14] The Court Organization Law likewise states that courts shall diligently handle any *shensu* petitions concerning final court decisions (Court Organization Law, Art. 13). Neither provides detail regarding how courts should handle such complaints.

Although the terms *zaishen* and *shensu* are often mixed, it is clear that the right to file a *shensu* challenging a final court decision is broader than the right to file a rehearing request. *Shensu* may be brought at any time, and outside the criminal law context there do not appear to be limitations on who may file a *shensu.* In practice, however, within the courts *shensu* petitions may be converted into rehearings. One recent study found that most formal rehearing cases begin as *shensu* (Zhang & Gu 2011: 34). This is particularly likely when litigants are challenging court decisions after the two year limit (now six months) on filing a retrial application in civil cases has expired.

The role of shensu in administrative law

China's three procedural laws provide the most important examples of how the right to *shensu* is incorporated in statutory law. Yet the impact of Article 41 is not limited to litigation. Examining the roles Article 41 and the right to *shensu* play in administrative law in China shows a range of ways in which the right to *shensu* has influenced legal development. Many of the 31 laws that make specific reference to *shensu* are substantive administrative laws. Three aspects of the impact of the concept of *shensu* on administrative law are of particular note.

First, Article 41 provided an important argument in support of the enactment of the Administrative Litigation Law and the right of individuals to sue the government in the 1980s (Yan 2013: 9-10). Arguments were made during debates in the National People's Congress that a key goal of the Administrative Litigation Law was to ensure compliance

[14] Although the Administrative Litigation Law uses the term *shensu* and makes no mention of *zaishen* initiated by plaintiffs, subsequent judicial interpretations from the Supreme People's Court referred to the use of *zaishen* in administrative cases and imposed a two-year limit for litigants to apply for review via *zaishen* procedures. As in the civil and criminal contexts, no time limitation applies to *shensu*.

with Article 41. Article 41 was also cited in arguments in support of similar rights to sue the state in administrative laws governing specific substantive areas, such as the right to sue the Marine Transportation Department under the 1983 Marine Safety Law (Ibid.). Thus Article 41 can be understood as providing important support for the right of individuals to sue the state.

Second, Article 41 has provided a mechanism for challenging final decisions in administrative litigation and administrative reconsideration. Put differently, in administrative cases the right to *shensu* provides a mechanism for protesting or challenging outcomes in formal procedures, both in the courts and through administrative review.

Third, Article 41 also provides a mechanism for seeking redress where substantive laws have not provided formal mechanisms for seeking redress. A number of administrative laws provide for a right to *shensu* even though they do not provide a right to bring an administrative lawsuit or file for administrative reconsideration. Even in cases where a right to sue or file for reconsideration does exist, the right to *shensu* may provide relief where the subject of administrative action has failed to challenge administrative action within the required timeframe. Thus, for example, the Civil Servants Law provides that civil servants and others hired by state actors may bring *shensu* to challenge administrative sanctions, even though such decisions are not reviewable in court or through administrative reconsideration (Civil Servants Law arts. 13, 90, 91, 92, 94; Zhang & Gu 2011: 34). Other laws, including the Teachers Law and the Judges Law, have similar provisions. The Administrative Penalty Act, while providing a right to bring formal challenges to the impose penalties, also provides for the right of citizens, legal persons, and other organizations to bring *shensu* challenging administrative sanctions and imposes an obligation on administrative actors to investigate such *shensu* (Administrative Penalty Law, art. 54).

In administrative law Article 41 has provided a basis for formal legal challenges to state action (the Administrative Litigation Law), a means of challenging the outcomes in such formal challenges (through administrative review and *zaishen* rehearings), and a mechanism for raising challenges even when laws provide no avenue of redress. Article 41 thus underpins both the right to use the legal system to challenge state action and the right of individuals to perform an end-run around the legal system when dissatisfied with an outcome or where formal law does not authorize their claims.

Substantive laws also make clear that petitions may go to a range of state actors – not just the courts or administrative agencies. For example, the 2004 Organization Law of Local People's Congresses and Governments states that local people's congress deputies have the power to receive *shensu* and the "views of the masses" toward government (Organization Law of Local People's Congresses and Governments, art. 44). Article 41 says nothing about the involvement of the courts in enforcing or protecting the rights set forth in Article 41 (Yan 2013: 9). Instead, one of the key uses of Article 41 in practice has been to provide a remedy against perceived injustices in the courts.

Article 41 and the petitioning system

Perhaps the most significant and debated manifestation of Article 41 outside of statutory law has been the petitioning system. Most scholarly debate surrounding Article 41 in

China focuses not on the meaning of *shensu* in statutory law but on whether the right to petition (*xinfangquan* 信访权) is protected by the Constitution. Some scholars argue that the petitioning system is a mechanism for enforcing the rights set forth in Article 41 (Shao 2010). Many scholars view petitioning as a political right providing for redress to citizens for infringements of individual rights. Others contend that the petitioning system is a mechanism for protecting other rights and that the petitioning system is needed because the courts are unable to provide a sufficient remedy to individuals (Zhang 2010b). Still other scholars disagree, arguing that petitioning remains wholly outside the legal system, and thus that Article 41 should be understood only as providing a legal basis for specific statutory provisions regarding *shensu,* not a constitutional right to petition. Scholarly debate pays little attention to another possibility: that Article 41 provides a legal basis not just for the existence of the petitioning system (and the right to *shensu* more generally), but for the practice of petitions and *shensu* undermining court authority by providing mechanisms for challenging final court decisions.[15]

The idea of an extra-judicial route to challenge state action is not new, in practice or in the Constitution. All four of the PRC's Constitutions have protected some form of the right to file a complaint. The 1954 and 1975 constitutions spoke of the right to file charges (*konggao* 控告) against illegal state action.[16] The 1978 constitution added the right to *shensu* alongside *konggao*.[17] Scholars have argued that the 1954 Constitution imposed on the state the obligation to create dedicated entities for receiving and responding to complaints, as opposed to protecting the rights of citizens to air those complaints, something already protected in theory by the constitution's guarantee of free speech (Tu 2012). This was done through the creation of the petitioning system.

My empirical research on the influence of petitioning on the courts suggests that petitioning to the courts undermines court authority and reinforces Party-state oversight of the courts.[18] My claim is <u>not</u> that the impact of petitioning on the courts stems from the fact that the right to file complaints is set forth in the Chinese constitution. The right to petition may be more robust than other provisions in the Constitution, but this is not because of the Constitution. Likewise, the lack of finality in the legal system is not due to

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[15] Scholars inside China and in the west have argued that the petitioning system undermines the courts, but have not generally noted that tension between petitioning and the authority of courts has a constitutional basis in Article 41.

[16] "Citizens of the People's Republic of China have the right to make written or oral charges to organs of state at any level against any person working in an organ of state for transgression of law or neglect of duty. People suffering loss by reason of infringement of their rights as citizens by persons working in organs of state have the right to compensation" (1954 Constitution, Art. 97).
"Citizens have the right to lodge to organs of state at any level written or oral charges of transgression of law or neglect of duty on the part of any person working in an organ of state. No one shall attempt to hinder or obstruct the making of such complaints or retaliate " (1975 Constitution, Art. 27).

[17] "Citizens have the right to lodge to organs of state at any level charges of transgression of law or neglect of duty on the part of any person working in an organ of state. Citizens have the right to complain to state organs when they have suffered losses as a result of infringement of their civic rights by any state organ or functionary. No one shall attempt to hinder or obstruct the making of such charges or retaliate" (1978 Constitution, Art. 55).

[18] As I have explained elsewhere (Liebman 2011), petitions regarding the courts may be filed both with the courts and with other Party-state organizations outside the courts. Within the courts there appears to be little difference between petitions and *shensu.*

Article 41, although Article 41 gives litigants the right to continue to appeal or file complaints even after cases are final. Instead, the impact of petitioning on the courts reflects the same historical tradition and political structure as does the Constitution. The Constitution mirrors actual practice, whereby courts are not independent and decisions are not final, and where substantive outcomes are more important than legal procedures. Although Article 41 may have been designed to protect the right to expose and contest official wrongdoing, it is operationalized in a way that undermines judicial authority

I am also not claiming that all of the rights in Article 41 are protected. That is clearly not the case. But I am suggesting that in practice the right to *shensu* is at times more robust than provisions in the Constitution that protect the independence of the courts.[19] Independence of the courts thus may be difficult or impossible to attain in China not just due to political intervention; independence may also be impossible because of a system in which mechanisms exist to challenge final decisions both inside and outside the courts. Article 41 is one provision that mirrors actual practice, which is often not the case when it comes to the provisions of the Chinese constitution.

The practice of allowing *shensu* petitions (and the constitutional recognition of the practice) draws on China's imperial tradition and on mass line ideology. It would be a mistake to understand Article 41 as simply endorsing the practice of Party officials intervening in court decisions; Article 41 draws on a deeper historical tradition of the state providing direct redress to aggrieved individuals. There are, of course, precedents for a constitutional right to petition the state elsewhere. For example, in the First Amendment to the U.S. Constitution (although in the U.S. context the right to petition generally means the right to petition the legislature, and is in practice part of the right to free speech). What is different in China is that the right to seek redress of grievances covers the right to protest already final court decisions and implies an obligation on the courts to reopen cases when errors are discovered.

The impact of Article 41 on Constitutional reform in China

It is also important to note what Article 41 does not do. Article 41 is not a fundamental requirement of transparency or informational disclosure by the state. Some in China have drawn parallels to constitutional ombudsperson systems in other countries. This comparison seems strained. Rather than creating an independent or autonomous oversight institution, Article 41 represents a tradition in China of non-differentiation, both among between legal institutions and non-legal institutions and among various Party-state departments or entities. Article 41 reflects a system in which often overlapping institutions resolve disputes and provide redress, not the creation of an external oversight institution. Indeed one of the curious aspects of legal provisions concerning *shensu* is that they appear to be designed to provide a mechanism for redress even where a law has explicitly rejected formal adjudication or administrative review.

What does this mean for the questions at the heart of this conference and volume, and for the future trajectory of Constitutional reform in China? Would reforming Article 41 or the

[19] "The people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals" (1982 Constitution, Article 126).

petitioning system make a significant change to the constitutional structure, or facilitate better enforcement of other constitutional provisions? This essay's brief examination of Article 41 suggests three responses.

First, significant reforms to the petitioning system alone are unlikely to lead to broader change. It is possible that they might pave the way for greater acceptance of the finality of court opinions. But such changes are unlikely to make a large difference. Petitioning itself is reflective of the problem of weak court authority; petitioning is not itself the source of the problem. Likewise recent efforts to tighten requirements for the filing of retrial applications in civil cases are unlikely significantly to reduce the pressure courts face from petitioners. Article 41 suggests deeper structural issues that must also be addressed if finality and court independence are to become characteristics of the Chinese legal system.

Second, can reform take place while the current system of allowing *shensu* and petitions continues? Can constitutional rights be enforced in a system in which court decisions can be reopened in response to petitions and protests at any time? One insight obtained from analyzing Article 41 is that constitutional reform is not merely a question of allowing the courts to handle constitutional claims. Any attempt to enforce the rights set forth in the Chinese constitution needs also to confront the question of how to achieve a balance between a system that is hyper-responsive to individual grievances and a system that operates according to rules and procedures. The petitioning system sometimes helps aggrieved individuals win redress. One reason that *shensu* and petitioning continue to be important is that other avenues for seeking redress are often lacking or ineffective; formal procedures often provide inadequate remedies for addressing grievances. The fact that many *shensu* relate to administrative action – and to administrative litigation -- suggests that courts are not yet in a position to address such problems (Yan 2013: 9-10). But the continued importance of both *shensu* and petitioning also reinforces a message that legal institutions lack a privileged position for adjudicating rights.

Third, this essay also raises a theoretical question: can finality be obtained in a system that continues to have a never-ending right to appeal? If not, does the enforcement of constitutional rights require either courts to play leading roles or court decisions to be final? Most other systems that have undergone constitutional transitions have opted for finality as a core value of rule of law. China has thus far taken a different path, maintaining a system that focuses on the substantive correctness of decisions. Such an approach reflects historical tradition and concern about the legitimacy of the state.

Many in China and the west have argued that this practice is not sustainable in the context of a modern legal system. Yet this perhaps may be yet another area where Chinese legal reform has the potential to challenge conventional wisdom. In a society undergoing rapid and radical change, providing a general mechanism for challenging state action even where law does not formally provide for such challenges may be important not only for preserving state legitimacy but also for addressing injustice. Examination of Article 41 suggests that there may be theoretical justification for the continuation of the system, in particular if courts continue to lack significant power to review state action. Article 41 has largely remained in the background in discussions about the constitution and about institutional reform in China. Yet addressing the tension inherent in Article 41 may be central to efforts to enforce the constitution and to deepen institutional reforms.

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